

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA

10 KST Data, Inc.,

11
12 Plaintiff,

13 v.

14 Northrop Grumman Systems Corp.
15 and DOES 1 through 25,

16 Defendants.
17

CASE NO. 2:17-cv-05125-MFW-PJW

18
19
20
21
22
23
24
25
26
27
28
**STIPULATED “CLAWBACK”
AGREEMENT AND
PRESUMPTIVELY PRIVILEGED
PROTOCOL ORDER**

Pursuant to Federal Rule of Civil Procedure 26(b)(5)(D), Federal Rules of Evidence 502(d) and (e), and Paragraph XI of the Stipulated Protective Order filed on September 26, 2017 (Dkt. No. 32) Plaintiff KST Data, Inc. and Defendant Northrop Grumman Systems Corp. (individually, a “Party” and collectively, the “Parties”) hereby stipulate and agree to this Stipulated “Clawback” Agreement And Presumptively Privileged Protocol Order which protects certain privileged and otherwise protected documents and electronically stored information (collectively, “document” or “documents”) against claims of waiver where, as here, they are

1 produced over objections, during the course of this litigation, pursuant to a court
2 order, the Parties' discovery requests, or other informal production.

3 Discovery in this action is likely to involve production of large volumes of
4 documents. The Parties wish to complete discovery as expeditiously as possible, in
5 compliance with discovery deadlines in this case, while preserving and without
6 waiving any evidentiary protections or privileges applicable to the information that
7 is contained in the documents produced, including as against third parties and other
8 Federal and State proceedings. Accordingly, the Parties hereby stipulate and agree
9 to, and the court hereby orders, pursuant to Federal Rules of Evidence 502(d) and
10 (e), as follows:

11 1. The inadvertent production of any document in this action shall be
12 without prejudice to any claim that such material is protected by any legally
13 cognizable evidentiary privilege or other protection including, but not limited to the
14 attorney-client privilege, the work product doctrine, trial-preparation materials, all
15 applicable trade secret protections, all third-party privacy rights, any protections
16 afforded to "Personal Health Information" by the Health Insurance Portability and
17 Accountability Act of 1996 ("HIPAA"), or any other privilege that may lawfully be
18 asserted. No party shall be held to have waived any rights by such inadvertent
19 production.

20 2. The Parties agree that all productions, designations, and requests for
21 return of protected material will be made in good faith. Accordingly, the Producing
22 Party shall not request the return of materials it produced knowing them to be
23 privileged. The Producing Party shall not file any motion of other pleading or action
24 to dismiss, remove, or disqualify the Receiving Party, any attorney or other person
25 employed by the Receiving Party, or a third-party who received, reviewed, used, or
26 disseminated materials that the Producing Party claims are privileged prior to the
27
28

1 receipt of a notice that the materials are claimed to be privileged as outlined in
2 paragraph 6.

3 3. Nothing in this Order prohibits a Producing Party from withholding
4 from production any material covered by any privilege or other protection properly
5 claimed.

6 4. Any Party may seek modification of this Order for good cause –
7 including but not limited to any circumstance created or exacerbated by the terms of
8 this Order that may result in an unreasonable burden being imposed on any party –
9 at any time, but the provisions of this Order shall continue to be binding after the
10 termination of this action, whether by settlement, judgment, or other disposition or
11 conclusion and all appeals therefrom, unless otherwise ordered. The Parties agree
12 to promptly meet and discuss joint modification of this Order should any specific
13 provision become overly burdensome upon implementation.

14 5. If a Producing Party determines that it has inadvertently produced a
15 document(s) that is privileged or subject to the work product protection, the
16 Producing Party shall provide written notice requesting that, within ten (10) calendar
17 days of receipt of such notice, the Receiving Party return, sequester, delete, and/or
18 destroy the document(s) in question. This notice shall be served upon counsel of
19 record and shall (a) identify the documents (i) by Bates number range and/or (ii)
20 with information sufficient to locate the document(s) within the materials produced,
21 after the Producing party has undertaken a good faith search and believes that not all
22 the privileged or protected communications or information concerning the same
23 subject matter has been identified by Bates number range; (b) identify the privilege
24 or protection asserted; and (c) explain the basis for the invocation of the privilege or
25 protection.

26 6. If any document produced by another party in this action is on its face
27 subject to a legally recognizable privilege or evidentiary protection, the Receiving
28

1 Party, shall: (a) refrain from reading the document any more closely than is
2 necessary to ascertain that it is privileged; (b) immediately notify the Producing
3 Party in writing that it has discovered documents believed to be privileged or
4 protected; (c) specifically identify the documents, including, if applicable, by Bates
5 number range and/or hash value range, and, (d) where possible, return, sequester, or
6 destroy all copies of such documents, along with any notes, abstracts or compilations
7 of the content thereof, within ten (10) calendar days of discovery by the Receiving
8 Party. Where such documents cannot be destroyed or separated, they shall not be
9 reviewed, disclosed, or otherwise used by the Receiving Party. The Receiving Party,
10 however, is under no obligation to search or review the Producing Party's documents
11 to identify potentially privileged or work product protected documents.

12 7. Upon written notice of an unintentional production by the Producing
13 Party or oral notice if such notice is delivered on the record at a deposition, the
14 Receiving Party must promptly return, sequester, or destroy the specified document
15 and any hard copies the Receiving Party has and may not use or disclose the
16 information until the privilege claim has been resolved. The Producing Party shall
17 also provide a privilege log for such documents setting forth the author, recipient(s),
18 subject matter of the document, along with the basis for the claim of privilege or
19 evidentiary protection, as well as any portion of the document that does not contain
20 privileged or protected information. To the extent that the Producing Party insists
21 on the return or destruction of electronic copies, rather than disabling the documents
22 from further use or otherwise rendering them inaccessible to the Receiving Party,
23 the Producing Party shall bear the costs of the return or destruction of such electronic
24 copies.

25 8. To the extent that the information contained in a document subject to a
26 claim has already been used in or described in other documents generated or
27 maintained by the Receiving Party, then the Receiving Party will sequester such
28

1 documents until the claim has been resolved. If the Receiving Party disclosed the
2 specified documents before being notified of its inadvertent production, it must take
3 reasonable steps to retrieve it. The Producing Party shall preserve the specified
4 documents until the claim is resolved.

5 9. The Receiving Party shall have ten (10) calendar days from receipt of
6 notification of the inadvertent production to determine in good faith whether to
7 contest such a claim and to notify the Producing party in writing of an objection to
8 the claim of privilege and the grounds for that objection.

9 10. The Receiving Party's return, sequestering, or destruction of such
10 privileged or protected documents as provided herein will not act as a waiver of the
11 Receiving Party's right to move for the production of the returned, sequestered or
12 destroyed documents on the grounds that the documents are not in fact subject to a
13 viable claim of privilege or protection. However, the Receiving Party is prohibited
14 and estopped from arguing that the production of the documents in this matter
15 constitutes a waiver of an applicable privilege or evidentiary protection, that the
16 disclosure of the documents was not inadvertent, that the Producing Party did not
17 take reasonable steps to prevent the disclosure of the privileged documents, or that
18 the Producing Party failed to take reasonable steps to rectify the error as set forth in
19 Federal Rules of Civil Procedure 26(b)(5)(B). The Producing Party need make no
20 showing with respect to measures taken to prevent the inadvertent production of the
21 documents in question in order to be entitled to their return.

22 11. Either Party may submit the specified documents to the court under
23 seal, subject to the Local Rules for the Central District of California, for a
24 determination of the claim and will provide the court with the grounds for the
25 asserted privilege or protection. The Receiving Party may not use the documents
26 for any purpose absent the court's order. Any Party may request expedited treatment
27 of any request for the court's determination of the claim.
28

1 12. Upon determination by the court that the specified documents are
2 protected by the applicable privilege or evidentiary protection, and if the specified
3 documents have been sequestered rather than returned or destroyed, the specified
4 documents shall be returned or destroyed. The court may also order the
5 identification and/or review of documents that have been identified as being
6 potentially subject to a legally recognizable claim by search terms or other means.

7 13. This Stipulated “Clawback” Agreement And Presumptively Privileged
8 Protocol Order is incorporated into but does not otherwise alter the Parties’
9 Stipulated Protective Order as entered by the court, dated September 26, 2017 (Dkt.
10 No. 32).

1 IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.

2 DATED: April 12, 2018

Respectfully Submitted,

3
4 WILMERHALE LLP

5 Andrew E. Shipley
6 Timothy C. Perry
7 Souvik Saha

LATHAM & WATKINS

David J. Schindler
Kyle R. Jefcoat
R. Peter Durning, Jr.

8 ERVIN COHEN & JESSUP LLP

9 Randall S. Leff

10 By /s/ Andrew E. Shipley

11 Andrew E. Shipley
12 Attorneys for Defendant
13 Northrop Grumman
14 Systems Corporation

By /s/ Randall S. Leff

Randall S. Leff
Attorneys for Plaintiff
KST Data, Inc.

15 **ATTESTATION**

16 Pursuant to Local Rule 5-4.3.4(a)(2)(ii), I, Andrew E. Shipley, attest that all
17 other signatories listed, and on whose behalf this filing is submitted, concur in this
18 filing's content and have authorized such filing.

19 By /s/ Andrew E. Shipley

20 Andrew E. Shipley

21 FOR GOOD CAUSE SHOWN, IT IS SO ORDERED.

22 DATED: _____

23
24
25
26 Hon. Patrick J. Walsh

27 United States Magistrate Judge
28